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## The OTP Cable Proposals: An End to Regulatory Myopia

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## COMMENT

### THE OTP CABLE PROPOSALS: AN END TO REGULATORY MYOPIA

Cable television,<sup>1</sup> the transmission and reception of video and audio signals along a coaxial cable, is simply another means of sending an information-filled electronic signal into the viewer's home or business. Communication by broadcasting, although most effective in terms of broad area coverage at a relatively low cost, is subject to reception interference which is often uncontrollable. For example, broadcast reception in New York City, within five miles of the central transmitter site, is far worse than television reception in Westchester or Nassau counties, twenty miles further away, simply because of the multiple reflections from the tall buildings.<sup>2</sup> More significantly, American urban areas are plagued by an acute shortage of available electronic spectrum, mainly because television broadcast stations must utilize such an enormous part of an essentially finite spectrum to transmit their signals to the public.<sup>3</sup>

Cable television developed as a simple "master antenna" service in response to broadcasting's inability to serve adequately outlying areas. The public wanted television, and soon entrepreneurs in the rural sections in-

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1. A "classical" cable television system has four main components. (1) Television signals are received by an antenna or a microwave relay system, or are originated at some local point. (2) The signals are relayed to a "head-end," amplified, and often changed in frequency. (3) They are then sent to different areas of the community over trunk and feeder lines. (4) Lastly, drop lines extending from the trunk or feeder lines transport the signals into the subscriber's home. See Knox, *Cable Television*, SCIENTIFIC AM., Oct. 1971, at 22. For a much more detailed description of the technological potential of cable television, see Baer, *Interactive Television: Prospects for Two-Way Services on Cable*, (The Rand Corp. R-888-MF, 1971).

2. Rosner, *Television Broadcasting and the Wired City*, 17 IEEE TRANSACTIONS ON BROADCASTING 43 (1971).

3. A single television signal requires a frequency range almost six times the electronic band width of the entire capacity necessary for commercial AM radio. For a discussion of the difficulties this huge allocation of the spectrum has caused other potential users, see H. LEVIN, *THE INVISIBLE RESOURCE: USE AND REGULATION OF THE RADIO SPECTRUM* (1971).

stalled tall antennae to pick up the faint distant broadcast signals.<sup>4</sup> Thus cable television became an adjunct to broadcasting and was christened Community Antenna Television (CATV). Twenty-five years later the industry is still struggling to wrest itself free of broadcasting's influence, economics, terminology, and its federal regulator, the Federal Communications Commission.

The conflicts that have arisen before the Congress, the FCC and the courts have centered on the competitive struggle between the two industries. But these disputes should not have led the FCC to confuse so completely<sup>5</sup> the *content* of the cable medium with the medium itself. As McLuhan has written: "The content of any medium is always another medium. The content of writing is speech, just as the written word is the content of print, and print is the content of the telegraph."<sup>6</sup>

The difference is not merely metaphysical, for it has practical and legal consequences as well. Cable television is as different from broadcast television as is the laser from the light bulb. This analogy is sound in that the light bulb is useful for illuminating large areas, while the laser's incredible directional and focusing capabilities make it eminently more suited for harnessing the power of light. Contrary to the pronouncements of broadcasters,<sup>7</sup> the FCC<sup>8</sup> and the Supreme Court,<sup>9</sup> cable television is not even "ancillary" to broadcasting, but is a completely new medium for individual expression. Admittedly, television signals pulse through its connections; but to erect a statutory scheme upon that superficially appealing foundation is both to ignore the traditional rationales for the regulation of broadcasting and, more significantly, to doom cable to a stunted growth.<sup>10</sup>

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4. See p. 95 *infra*.

5. This confusion has been implicit in the FCC's attitude toward cable television for some time. In 1969, Rosel H. Hyde, then chairman of the FCC testified that the FCC's goal was "to integrate the CATV operation into the national television structure in a manner which does not undermine the television broadcast service . . . ." *Hearings on H.R. 10268 & H.R. 10510 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 1st Sess., ser. 91, at 10-11 (1969) [hereinafter cited as 1969 Hearings]*.

6. M. McLuhan, *UNDERSTANDING MEDIA: THE EXTENSION OF MAN* (paperback ed. 1965).

7. See Note, *The Childhood of CATV*, 30 OHIO ST. L.J. 382 (1969).

8. Second Report and Order on CATV, 2 F.C.C.2d 725 (1966).

9. See p. 99 & note 43 *infra*.

10. It would appear that cable's growth has already been stunted by the uncertain regulatory and economic environment. Fred W. Friendly, a well-respected broadcast scholar and consultant to the Ford Foundation, testified to this effect during the 1967 hearings before the House of Representatives on the Public Broadcasting bill: "I think by 1975 the whole profile of how we communicate in this country is going to be changed greatly by CATV . . . . CATV might revolutionize television as much as satellites, as

Practically, the differences between the two media are patent. Broadcasting is an advertiser-supported medium. Transmitting over wide geographic areas to audiences numbering in the tens of millions, the broadcast networks, in effect, sell to the advertiser the audience which is attracted to their particular program. The limited electromagnetic spectrum allows only six or seven stations to operate in any one city, hence air time is a scarce and expensive commodity. The larger the audience the more the advertiser is willing to pay, so that each precious moment is programmed to maximize the audience size. Cable, on the other hand, serves local areas or single communities,<sup>11</sup> and is supported mainly by subscriber revenues. There is no scarcity of channel space, and productions can be specifically directed to audiences which are miniscule by broadcast standards. The potential of cable for increasing electronic communication services has been repeatedly heralded,<sup>12</sup> and it is not the purpose here to detail that potential. It is sufficient to emphasize that as long as the Congress, the FCC and the courts continue to treat cable television as if it were a part of broadcasting, its vast potential will fail to develop.

No matter what the reason for this failure—broadcast industry resistance, governmental myopia, economic difficulties—it is time for both the private and public sectors to recognize that the present course of ever-increasing regulation at every level—federal, state and local—could easily close the door on cable's undoubted technological advances, much to the detriment of the American people.

The public's stake in this media controversy is great, and is best exemplified by the continuing attempts by differing groups to obtain access to the electronic media.<sup>13</sup> This desire to communicate personal views through the

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much as television has revolutionized radio." *Hearings on H.R. 6736 & S. 1160 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 1st Sess., at 408 (1967). Mr. Friendly's hopeful forecast has not come to pass. See Kriegsman, *Assessing the Clouds in Cable's Blue Sky*, *The Washington Post*, March 24, 1974, § L, at 1, col. 3 and Shales, *Cable TV's Gap Between Promise and Progress*, *The Washington Post*, June 12, 1974, § C, at 1, col. 1.

11. Irving Kahn has discussed the selective programming that is possible on the cable. In 1969, his cable television company served upper Manhattan, encompassing about 400,000 dwellings units, a small figure by broadcast standards. But this population was further broken down into communities of approximately 30,000 homes, so that a little league baseball game played in Inwood was shown only to the community of Inwood, where the local interest existed, not in west Manhattan or Harlem. Also, according to Kahn, such programming can "outdraw a network show any day of the week." The game cost about \$1,000 to produce. See 1969 *Hearings* 65.

12. See, e.g., Smith, *The Wired Nation*, 210 *THE NATION* 605 (1970); Notice of Proposed Rulemaking and Notice of Inquiry on CATV, 15 F.C.C.2d 417, 420 (1968).

13. See p. 107 *infra*.

national media lies at the heart of two Supreme Court decisions rendered within the past eighteen months.<sup>14</sup> In both cases the access seekers were responding to the innate inadequacy of the present centralized television and newspaper structures to cover all the views, all the time. Thus, the desire for access can be viewed, like cable itself, as a reaction to present media limitations. Caught in a quandary of competing first amendment interests, the Court held that the prerogatives of the newspaper and broadcast industries outweighed the right of the public to force them to publish<sup>15</sup> or broadcast<sup>16</sup> particular divergent views. These decisions, while in line with the traditional view of a free press unfettered by government restraints, clearly limit the public's opportunities for effective self-expression. Accordingly, when a different conduit for communication evolves, one which is characterized by an abundant capacity for transmitting human messages, such a medium should be carefully nurtured and allowed to develop fully as soon as possible.

Cable television is such a medium. While a commercial broadcaster cannot afford to "turn off" any listeners for fear of losing advertising revenue,<sup>17</sup> the cable operator must seek diversity to make his total "channel package" attractive to the prospective subscriber.

Of course, no one questions the desirability of theoretical public access and increased channel diversity, but just how such worthy goals are to be accomplished presents a much more difficult question. Fortunately, perhaps, only two choices are presently available. The first, championed by the FCC, simply provides that the cable industry be regulated as pervasively as broadcasting, if not more so.<sup>18</sup> The second approach, recently proposed by the Office of Telecommunications Policy (OTP),<sup>19</sup> would divest the FCC of many of its asserted powers, would nevertheless not allow the cable operator

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14. *Miami Herald Publishing Co. v. Tornillo*, 94 S. Ct. 2831 (1974) (Florida statute which grants a political candidate a "right to reply," and compels a newspaper to grant space for that reply, held unconstitutional); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); see pp. 109-10 *infra*.

15. *Miami Herald Publishing Co. v. Tornillo*, 94 S. Ct. 2831 (1974).

16. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

17. In *CBS*, Justice Brennan asserted that broadcasters, unlike newspapers, will deliberately avoid as much controversy as possible, fearing that such controversy may inhibit the profits gained from standard product advertising. *Id.* at 187. See also Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 773-74 n.26 (1972).

18. See pp. 104-06 *infra*.

19. The OTP proposal is actually based on a report issued by the Cabinet Committee on Communications which was submitted to President Nixon on January 14, 1974 by the Chairman of the Committee and head of the Office of Telecommunications Policy, Clay T. Whitehead. Letter from Clay T. Whitehead to President Richard M. Nixon, January 14, 1974, in CABINET COMMITTEE ON CABLE COMMUNICATIONS, *CABLE: REPORT TO THE PRESIDENT* (1974) [hereinafter cited as *CABLE REPORT*].

to control the program content of the separate channels, and would provide for greater local government regulatory autonomy.<sup>20</sup>

As the discussion below indicates, OTP's proposal presents the most reasonable alternative when examined in the light of the history of cable television and the FCC's regulatory reactions as exemplified through the development of public access to cable television.

## I. CABLE TELEVISION: A TECHNOLOGICAL RESPONSE TO BROADCASTING

### A. *An Historical Summary*

The cable television industry had its genesis in the late 1940's and early 1950's. Although there are disputes among the pioneers, L. E. "Ed" Parsons is generally credited with having begun the first cable system in Astoria, Oregon in 1949.<sup>21</sup> The operator of a radio station, Parsons responded to his wife's desire to have "pictures with her radio" by traveling around Clatsop County, Oregon with signal survey equipment in an attempt to pick up television signals from Seattle, Washington, 125 miles away. He succeeded by placing an antenna atop a local hotel and promptly developed a sending unit which extended the service to others, at a rate of \$100 per installation. Quite an entrepreneur, Parsons then sold television sets to the subscribers.<sup>22</sup>

Almost simultaneously, cable systems were developing in the mountainous areas of Pennsylvania where television reception was marginal at best. The public demanded television, and, although many of the pioneer cable operators were motivated by a desire to sell television sets, the subscribers provided the market and the capital for the infant industry.<sup>23</sup> Until the United States Tax Court's ruling to the contrary in 1957,<sup>24</sup> the operators declared the \$125 to \$200 installation charges as non-taxable income or "contributions-in-aid-of-construction," and applied it almost entirely to construction. One commentator has suggested that without this tax break during the early years the cable industry might not have survived at all.<sup>25</sup>

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20. See pp. 115-16 *infra*.

21. Smith, *The Emergence of CATV: A Look at the Evolution of a Revolution*, 58 PROCEEDINGS OF THE IEEE 967 (1970).

22. The story of L. E. Parsons has been documented in M. Mayer, *A Historical Study of the Issues and Policies Related to the Educational Application and Utilization of Community Antenna Television*, (Ph. D. dissertation, Northwestern Univ., Evanston, Ill. 1969), cited in Smith, *supra* note 21, at 968 n.6.

23. See M. SEIDEN, *AN ECONOMIC ANALYSIS OF COMMUNITY ANTENNA TELEVISION SYSTEMS AND THE TELEVISION BROADCASTING INDUSTRY* (1965).

24. See, e.g., *Teleservice Co. v. Commissioner*, 27 T.C. 722 (1957).

25. Smith, *supra* note 21, at 969.

Perhaps the most significant early legal development was the nearly universal utilization of cable "franchises." Seemingly without precedent, these franchises were issued by the community to be served as a means of granting the requisite permission to cross public streets and alleyways with relay cables. Although most state grants of this privilege were to public utilities, the public's demand for television was such that the local authorities' right to franchise was seldom challenged<sup>26</sup> and has been established de facto without significant resort to the courts.

Cable continued to expand. However, since an FCC "freeze" on the issuance of new broadcast television licenses seemed to be cable's *raison d'être*,<sup>27</sup> the Commission's implementation of a nationwide Television Allocation Plan<sup>28</sup> ending the "freeze" in 1952 should have meant the early demise of cable television. Indeed, cable television was entirely excluded from the Allocation Plan despite its 14,000 subscribers, an indication of the indifference to the cable industry at the time.<sup>29</sup>

After the "freeze" on new television stations was lifted, broadcasters realized that cable could do more than slightly expand their markets. Competitive animosity soon developed, and as early as 1954 a small town broadcast station (WJPB-TV) in Fairmont, West Virginia (population 29,346) filed a petition with the FCC "to define the existence or extent of the jurisdiction of the FCC with respect to the installation and operation of any community antenna television distribution system, to the end that the same rules and orders of the commission applicable to television stations shall apply to

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26. See MONTGOMERY COUNTY, MD. CODE § 65-10 (1950) for an example of the procedures for granting such franchises during the early years of cable's growth. The first cable franchise agreements normally did not specify rates for service nor did they provide any type of rate control. Most were merely ordinances granting permission to cross streets, alleys, and granting limited access rights to set poles. More recently, however, it has become common for franchising authorities to establish explicit connection and service charges, and some require authorization for rate increases. Although cable operators have consistently opposed classification of their operations as public utilities, their natural monopoly status and need for public rights-of-way has caused them to experience great difficulty in attempting to increase their charges. Moreover, these factors have precipitated new, extremely detailed, comprehensive state cable statutes which in the area of ratemaking grant broad discretion to local authorities. See, e.g., CABLE TELEVISION ACT, 48 N.J.S.A. § 5A (Supp. 1974); N.Y. CABLE TELEVISION LAW ch. 466, § 825 (McKinney 1972).

27. Smith, *supra* note 21, at 969.

28. Sixth Report and Order No. 8736, 91 P & F RADIO REG. 601 (1952).

29. 39 TELEVISION FACTBOOK 79-a, Table 1 (1952). The National Cable Television Association has recently announced that in 1973 there were an estimated 8 million subscribers to over 3,000 systems, and that cable revenues reached \$468.1 million, a gain of \$42.5 million over 1972. *Cable Revenues Rise 10 Percent in 1973*, 2 CABLELINES 3 (1974).

community television distribution systems.”<sup>30</sup> In 1958, the FCC decided that it was “doubtful” that cable television fell under its statutory jurisdiction.<sup>31</sup> But a month later it began an inquiry into the “impact” of cable on the “orderly development of television broadcasting.”<sup>32</sup> The broadcasters also turned to Congress for shelter. The Senate Subcommittee on Communications conducted hearings in 1958 on the alleged “unfair competition” of cable television with broadcast television.<sup>33</sup> When Congress ultimately re-

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30. The petition is quoted in *Inquiry into the Development of CATV and Repeater Services*, 26 F.C.C. 403, 404 (1959) [hereinafter cited as *Inquiry*].

31. “[I]t appears doubtful to the Commission that any of those [broadcasting] provisions may be fairly interpreted to reach CATV systems. Such systems operate by means of wire lines, and . . . involve no radio transmission which might require some form of license from the Commission.” *Frontier Broadcasting Co. v. Laramie County TV Co.*, 24 F.C.C. 251, 255-56 (1958) (complaint filed by 13 broadcast television licensees against 288 CATV operators, requesting that the FCC exercise common carrier jurisdiction over cable systems). This doubt was first mentioned judicially in *Clarksburg Publishing Co. v. FCC*, 225 F.2d 511 (D.C. Cir. 1955), where Circuit Judge Bazelon remanded the FCC’s grant of a television station construction permit back to the FCC for further hearings:

Although it has been studying the question for some time, the Commission is uncertain whether the [cable] system should be deemed a broadcast service or a common carrier, and whether its operations are sufficiently interstate in character to justify or require federal regulation.

*Id.* at 517 n.18. See also Address by Commissioner John C. Doerfer, National Ass’n of R.R. and Util. Comm’rs, in 14 *FED. COM. B.J.* 4, 5 (1955); *Lilly v. United States*, 238 F.2d 584, 586 (4th Cir. 1956).

32. On May 22, 1958, the FCC released a notice of inquiry concerning cable television. After soliciting and receiving evidence for nearly a year from the groups involved, the FCC promulgated a Report and Order on April 13, 1959. Prior to this inquiry, the only affirmative regulatory action taken toward cable television by the FCC was in 1956 when the FCC issued construction and insulation standards for the cables so that they would not “leak” any electronic signals and thus interfere with the standard broadcast signals. See 21 *Fed. Reg.* 5368 (1956).

33. Allegations of “unfair competition” have been the FCC’s and broadcaster’s mainstay. Naturally, the more successful the cable system the more unfair the competition is alleged to be. By taking this position, the FCC can use cable’s potential to serve a great number of people in a community to keep cable out of the community. One example arose during the hearings on the cable installations in San Diego, California. See *Decision on Extension of CATV*, 13 F.C.C.2d 478 (1968). The hearings showed that cable penetration into the market, with the importation of distant broadcast signals, could be substantial, including as many as 50% of the TV homes. San Diego was the fiftieth largest television market at the time, with three network stations, a new independent UHF and one educational station. As Rozel Hyde, then Chairman of the FCC, testified during congressional hearings, “The effect of the unfair competition of present CATV operation upon local TV broadcast operations would be significant because the penetration of CATV would be of a significant nature.” 1969 *Hearings* 14. Thus certain increased television service for the many was denied so that competition over potential service to a few would not be heightened.

Based mainly on the San Diego case, the FCC decided in December 1968 to impose a rule that would permit cable systems to carry distant signals within specified thirty-



jected several bills<sup>34</sup> which would have provided for regulation of cable, the FCC moved in to fill the regulatory vacuum.<sup>35</sup>

In 1962, the FCC, at the request of a small television station, denied a construction permit to a company which sought to retransmit distant broadcast television signals to local cable systems;<sup>36</sup> its decision was affirmed by the United States Court of Appeals for the District of Columbia Circuit.<sup>37</sup> Strengthened by this decision, and drawing on information which predicted a

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five mile zones within the 100 largest TV markets, only if the system has the express authorization of the originating stations to retransmit the program or program series being carried. This rule is analogous to the consent provision embodied in § 325(a) of the Communications Act of 1934, 47 U.S.C. § 325(a) (1971), and applicable to broadcast stations. See 1969 Hearings 14.

34. They were introduced in Congress in 1959. After hearings, the Subcommittee on Communications of the Senate Interstate and Foreign Commerce Committee reported its own bill to the Senate, S. 923, 86th Cong., 1st Sess. (1959). The debate lasted for two days on the Senate floor, but the bill was recommitted and subsequently died. During the next Congress the FCC requested the introduction of another bill, S. 1044 and H.R. 6840, 87th Cong., 1st Sess. (1961), but it was not acted upon at all. After the FCC released its First Report and Order on Microwave-served CATV, 38 F.C.C. 683 (1965), extensive hearings were held on a third bill, beginning on May 28, 1965, but no further action was taken. See *Hearings on H.R. 7715 Before the Subcomm. on Communications and Power of the House Comm. on Interstate & Foreign Commerce*, 89th Cong., 1st Sess. (1965). One year later, Representative Harley O. Staggers (D-W. Va.), Chairman of the Committee on Interstate and Foreign Commerce, introduced, again at the request of the FCC, a bill which would have given the FCC broad authority to regulate cable television. H.R. 13286, 90th Cong., 1st Sess. (1966). Congressman Paul G. Rogers (D-Fla.) then introduced an opposing bill which would have denied the FCC's authority in the cable field. H.R. 13286 was approved during the hearings, and reported to the House by the Committee on June 17, 1966, substantially as submitted by the FCC, but once again the bill was not enacted. Congress having failed to act, the FCC stepped in with "interim procedures" promulgated in December 1968. See Notice of Proposed Rule-making and Notice of Inquiry, 15 F.C.C.2d 417 (1968).

35. The FCC has repeatedly stated that it would "welcome (i) a congressional guidance as to policy, and (ii) congressional clarification of our authority, which would lay the troublesome jurisdictional question at rest;" but the entreaties remain unheeded. See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 n.30 (1968); Second Report and Order on CATV, 2 F.C.C.2d 725, 734 (1966); Inquiry 421. It is well to note that at least two dozen members of Congress have personal interests in broadcasting properties, perhaps explaining congressional caution over the emerging cable industry. See L. KOHLMEIER, JR., *THE REGULATORS* 61 (1969).

36. *Carter Mountain Transmission Corp.*, 32 F.C.C. 459 (1962).

37. *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir.), cert. denied, 375 U.S. 951 (1963). The *Carter Mountain* decision represents a landmark in cable regulation, ostensibly because it affirmed the FCC's right to regulate cable television under the authority of the broadcast-oriented federal Communications Act of 1934. However, the *Carter Mountain Transmission Corp.* was not a cable system but a microwave common carrier; no cable system was even before the court. Secondly, although the appellants raised the issue of the FCC's wrongful exercise of jurisdiction over cable systems, the court held that the FCC's denial of the application to transmit to cable systems was not an attempt to regulate the cable systems. 321 F.2d at 363-64.

significant economic impact on broadcasters,<sup>38</sup> the FCC abandoned case-by-case adjudication in favor of rulemaking proceedings<sup>39</sup> affecting all cable systems, utilizing microwave relays to transmit the signals.<sup>40</sup> Less than a year later the FCC extended the coverage of its rules to all cable systems, whether or not they used microwave.<sup>41</sup> The FCC's rules reflected the broadcast industry's view that cable was an unfair competitor with broadcasting.<sup>42</sup> In a landmark case which judicially sanctioned the FCC's rulemaking authority, the Supreme Court, in *United States v. Southwestern Cable Co.*,<sup>43</sup>

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38. See, e.g., M. SEIDEN, *AN ECONOMIC ANALYSIS OF COMMUNITY ANTENNA TELEVISION SYSTEMS AND THE TELEVISION BROADCASTING INDUSTRY* (1965).

39. The distinctions between rulemaking and case-by-case adjudication by regulatory agencies are governed by the Administrative Procedure Act, 5 U.S.C. §§ 553-54 (1970). The Act defines "rule" in § 551(4) as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." The Act further defines "adjudication" as the "process" for formulating an "order" or the "final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency . . . other than rulemaking." 5 U.S.C. §§ 551(6)-(7) (1970).

Although the dissimilarities are by no means clear, the rulemaking procedure allows the agency to issue more general regulations of future effect, following a general notice of their proposed rules in the Federal Register and submission of written materials by "interested persons," with or without oral argument. After consideration, the agency may adopt rules incorporating within them a "concise general statement of their basis and purpose." For commentary on these two types of administrative action, see generally Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 958-67 (1965).

40. First Report and Order on CATV, 38 F.C.C. 683 (1965). Simultaneously, the FCC issued a *Notice of Proposed Rulemaking* which included a memorandum asserting the FCC's authority to regulate all cable systems, microwave and non-microwave. The *Notice* also detailed certain issues to be considered in subsequent hearings on the nature and necessity of cable regulations. 1 F.C.C.2d 453, 465 (1965).

41. Second Report and Order On CATV, 2 F.C.C.2d 725 (1966). These rules were superseded in 1972, but they are codified in 47 C.F.R. §§ 74.1101, 1109 (1971). Significantly, these rules dealt extensively with cable's supposedly greatest threat to broadcasting—distant signal importation. Whereas in broadcasting additional program services are presumed to be in the public interest, under § 74.1107 the cable television operator had to show, at an evidentiary hearing, that importation of distant signals into the 100 largest television markets would "be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area." No definition of "healthy maintenance" was given.

42. See Second Report and Order on CATV, 2 F.C.C.2d 725, 778-79 (1966); see also note 33 *supra*. At least one court has disagreed, holding that cable did not unfairly compete with broadcasting. *Cable Vision, Inc. v. KUTV, Inc.*, 211 F. Supp. 47 (D. Idaho 1962), *rev'd*, 335 F.2d 348 (9th Cir. 1964) (antitrust action brought by cable system against a broadcast television station which counterclaimed, alleging tortious interference with contractual rights and unfair competition).

43. 392 U.S. 157 (1968). Justices Douglas and Marshall did not take part in the consideration of the case. Justice White concurred, basing his separate opinion on the statutory mandate of the Communications Act of 1934, 47 U.S.C. §§ 301, 303 (1971).

found the cable regulations to be "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."<sup>44</sup> Ironically, the Court relieved cable systems from copyright liability during the same term,<sup>45</sup> declaring that simply operating a master antenna reception service was not a "performance" under the Copyright Act of 1909.<sup>46</sup>

With its authority thus acknowledged,<sup>47</sup> the FCC soon issued the *Notice of Inquiry and Notice of Proposed Rulemaking on Docket 18397*,<sup>48</sup> which demanded, as later clarified,<sup>49</sup> that a cable operator could not import any distant television signals into a local market unless he first obtained pro-

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44. 392 U.S. at 178.

45. *Fortnightly Corp. v. United Artists Television Corp.*, 392 U.S. 390 (1968).

46. 17 U.S.C. § 1 (1970). This view was recently reaffirmed in *TelePrompster Corp. v. CBS*, 94 S. Ct. 1129 (1974). The *TelePrompster* litigation was initially stayed by agreement of the parties, pending the Supreme Court's *Fortnightly* decision. After that decision the plaintiffs sought to distinguish the cable system defendants from those whose operations had been held not to violate the copyright law in *Fortnightly*. The issues were slightly different. Unlike *Fortnightly*, the defendants in *TelePrompster* were transmitting broadcast signals from stations hundreds of miles away and were engaged in program origination. Neither of the three federal courts which considered the question felt that these factors involved copyright infringement. Immediately after the Court rendered the *TelePrompster* decision the broadcast and motion picture lobbying groups began pressing for a revised copyright law that will cover cable television. Indeed, within a few months after the *TelePrompster* decision, the Senate Judiciary Committee held hearings concerning the proper computation ratio for copyright fees to be imposed on cable operators. See Carmody, *A Cable TV Victory: Still in the Big League*, *The Washington Post*, June 12, 1974, § C, at 4, col. 1.

47. The FCC's sudden assumption of wide-ranging rulemaking authority in this area, based on the *Southwestern* case, was quickly questioned by some members of Congress. This exchange occurred during the 1969 hearings of the House Committee on Interstate and Foreign Commerce between Rozel Hyde, then Chairman of the FCC, and Representative Torbert H. MacDonald (D-Mass.):

Mr. MacDonald: Mr. Chairman, aren't you assuming quite a good deal from stretching that point in the case you cite? They say that your right comes if it is reasonably ancillary.

Mr. Hyde: Yes.

Mr. MacDonald: Now that still is subject to appeal to the Court if somebody does not think you are being reasonable?

Mr. Hyde: Any particular case can, of course, be appealed and if our rules are not found to be reasonable we will lose.

Mr. MacDonald: Right. But when you make the blanket assumption that you do have the authority, I just query that. I was hoping that other members of the subcommittee would also not just take your words at face value, although I know you mean them in the best way possible, but there is a question about that. It is not black and white.

Mr. Hyde: There is argument about it, you are right.

1969 Hearings 36.

48. 15 F.C.C.2d 417 (1968).

49. 20 F.C.C.2d 201 (1969).

gram-by-program approval from each party that owned any segment of the broadcast. This requirement made the importation into the local market of audience-attracting signals originating at distant stations virtually impossible, resulting in a "freeze" on cable expansion<sup>50</sup> similar to the one clamped on the broadcast industry which had been partially responsible for cable's early growth. During this nearly four-year hiatus, lasting until early 1972, the FCC examined cable's impact on broadcasting,<sup>51</sup> Congress held hearings,<sup>52</sup> cable study groups issued reports,<sup>53</sup> visionaries exulted its potential<sup>54</sup> and the public waited.<sup>55</sup>

Finally the FCC promulgated a confusing,<sup>56</sup> albeit comprehensive set of regulations<sup>57</sup> imposing many conditions on cable system operation. It was during the "freeze," however, as one noted commentator has suggested, that the "Commission appeared to have substantially altered its relationship with this media challenger by bringing cable within the process it had previously threatened."<sup>58</sup> Thus, those four years are crucial to an understanding of the present relationship between the FCC and cable television.

### B. *The FCC v. Cable Television: Cablecasting Becomes Broadcasting*

Federal regulation was first imposed on the broadcasting industry because the lack of frequency standards had resulted in a "cacophony of competing voices" clogging the public airways, "none of which could be clearly or predictably heard."<sup>59</sup> By establishing the FCC, and its predecessor, the Federal

50. This de facto freeze was rather openly discussed by a dissenting member of the Commission. CATV Interim Procedures, 16 P & F RADIO REG. 2d 1517, 1529 (1969) (dissenting opinion). Such regulatory reactions to new technology have occurred before. See LeDuc, *The FCC v. CATV et al.: A Theory of Regulatory Reflex Action*, 23 FED. COM. B.J. 93 (1969).

51. See, e.g., 15 F.C.C.2d 417 (1968).

52. See, e.g., 1969 Hearings, *supra* note 5.

53. See, e.g., SLOAN COMMISSION, *ON THE CABLE: THE TELEVISION OF ABUNDANCE* (1971); THE URBAN INSTITUTE, *CABLE TELEVISION IN THE CITIES: COMMUNITY CONTROL, PUBLIC ACCESS, AND MINORITY OWNERSHIP* (1971).

54. E.g., Smith, *The Wired Nation*, 210 THE NATION 582 (1970).

55. *What's Ahead For Television*, NEWSWEEK, May 31, 1971, at 72.

56. "[T]he new rules contain provisions that create confusion even among practitioners of the esoteric art of communications law. For the uninitiated lawyer, the rules are enough to make him throw up his hands in horror." Hochberg, *Which Way is Cable TV Going?*, 59 A.B.A.J. 77 (1973).

57. 37 Fed. Reg. 3252 (1972), *reconsidered*, 37 Fed. Reg. 13848 (1972).

58. D. LEDUC, *CABLE TELEVISION AND THE FCC: A CRISIS IN MEDIA CONTROL* 182 (1973).

59. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376 (1969). See also 60 GEO. L.J. 871, 1032 (1972).

Radio Commission,<sup>60</sup> Congress sought to organize the allocation of broadcast frequencies and thus end the signal interference. In performing this function, the FCC requires that those wishing to broadcast be licensed, and that such licenses only be granted when the public interest, convenience or necessity will be served.<sup>61</sup> This licensing power has been construed broadly,<sup>62</sup> and the "public interest" banner has been used to deny broadcast licenses,<sup>63</sup> prohibit "offensive" speech,<sup>64</sup> and more specifically to regulate program content.<sup>65</sup>

Historically this governmental control over a medium of public expression has been premised upon the inherent limitations of the broadcast spectrum. Despite the public nature of the airwaves, they cannot be available to all at once; hence regulation must be imposed to assure that the spirit, if not the letter, of the first amendment will be preserved.<sup>66</sup> It is clear that without this spectrum limitation, a government agency would be hard pressed to constitutionally justify the regulation of program content, especially when carried out under any rule which exercised a prior restraint<sup>67</sup> over what could be broadcast.

This may seem like elementary first amendment theory. It may also seem elementary that the rationale of the limited electronic spectrum cannot be applied to cable television because it presently has more than enough channel capacity to accommodate those who wish to speak out, and that, therefore, cable regulation raises constitutional questions that broadcast regulation does not. The FCC, however, summarily rejected this seemingly obvious

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60. The Federal Radio Commission was established under the Radio Act of 1927, ch. 4, 44 Stat. 1162.

61. 47 U.S.C. § 309(a) (1971).

62. *NBC v. United States*, 319 U.S. 190, 214-18 (1943).

63. See generally Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 98-103 (1967).

64. See, e.g., *Pacifica Foundation*, 36 F.C.C. 147 (1964). Congress declared the broadcast of such speech to be a criminal act in 18 U.S.C. § 1464 (1970).

65. See, e.g., *Banzhaf v. FCC*, 405 F.2d 1082, 1095 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). One federal judge has recently expressed misgivings about the FCC's role in regulating program content. *Citizens Commission to Save WEFM v. FCC*, No. 73-1057 (D.C. Cir. Oct. 4, 1974) (Bazelon, C.J., concurring).

66. "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969). This decision clarified the premise enunciated earlier, most notably in *NBC v. United States*, 319 U.S. 190, 226 (1943).

67. "Prior restraints" on first amendment rights have long been disfavored, the classic example being *Near v. Minnesota ex rel. Olsen*, 283 U.S. 697 (1931) (Minnesota statute allowing the perpetual injunction of particular publications held violative of the first amendment).

consideration in its *CATV First Report and Order*, and, instead, confused the "content" of a medium with the medium itself:

Since CATV systems use broadcast signals as the backbone of the service they provide, they come within the regulation of this agency, if reasonably related to the public interest. If the regulation is so related, it is not barred by the first amendment. It is thus immaterial that the scarcity of frequencies rationale underlying first amendment rulings in the broadcast field does not apply directly to the cable technology.<sup>68</sup>

Calling this dismissal of the constitutional issue "highly unsatisfying,"<sup>69</sup> a recent commentator implies, after an exhaustive analysis of all the justifications for regulating cable as an "adjunct" to broadcasting, that cable should be given the much broader constitutional protection afforded the print media.<sup>70</sup> Admittedly such protestations are rather like yelling "fire" while standing in the ashes, as the constitutional issue has become fairly moot and is unlikely to arise again. This is so because the necessity of some sort of federal regulation has long been accepted by the industries involved,<sup>71</sup> and the FCC has now constructed a massive set of regulations which rest upon the narrow authority granted the Commission by the Supreme Court in *United States v. Midwest Video Corp.*<sup>72</sup>

In *Midwest* a substantially divided Court upheld the FCC's authority to regulate cable, with Chief Justice Burger furnishing a reluctant deciding vote. He was not "fully persuaded"<sup>73</sup> that the FCC could force cablecasters to originate local programming:

Candor requires acknowledgment . . . that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by the decisions of the Commission and the courts. The most explosive development of CATV suggests the need for a comprehensive re-examination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the courts.<sup>74</sup>

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68. 34 Fed. Reg. 17651, 17658-59 (1969).

69. Note, *Cable Television and the First Amendment*, 71 COLUM. L. REV. 1008, 1014, 1038 (1972).

70. *Id.* at 1014, 1038.

71. "I think that if we had a regulatory role clearly defined by Congress, under which the Commission would work, it should and would control broadly how cable is used . . . ." Statement by I. Kahn, then president of a large cable television enterprise, Tele-Prompter Corporation, in 1969 *Hearings* 45.

72. 406 U.S. 649 (1972).

73. *Id.* at 676.

74. *Id.*

Chief Justice Burger's comments, coupled with the vigorous dissent of four Justices,<sup>75</sup> certainly indicates a realization, at least implicitly, that insurmountable problems may arise when an agency organized for, and engaged in, the regulation of broadcasting and common carriers assumes control over a medium which involves neither.

*C. The 1972 Rules: The FCC Assumes Control*

The present FCC cable regulations, enacted in 1972, are the product of a "prolonged running battle"<sup>76</sup> among cable, broadcast, motion picture and copyright interests. They naturally focus on specifically limiting cable's retransmission of television broadcast signals. The rules do permit expansion of cable into major metropolitan areas but they also contain restraints which are designed, in the view of the FCC, to limit the competitive threat to the existing broadcast industry<sup>77</sup> and to stimulate the use of cable for non-broadcast services.<sup>78</sup>

The rules require that each newly-franchised cable system obtain a "Certificate of Compliance" from the FCC before it begins to carry broadcast television signals.<sup>79</sup> This permits the Commission to determine whether the local franchising process, the franchise agreement and the design of the cable system comply with FCC requirements. The certification process also permits the applicant and the franchising authority to request waivers of, or "special relief" from, the FCC's requirements if the "grant of such relief would serve the public interest."<sup>80</sup>

Presently a two-tier regulatory system exists. The FCC regulates the carriage of broadcast television and radio signals on the cable;<sup>81</sup> exclusive program channel rights;<sup>82</sup> the total channel capacity required;<sup>83</sup> cablecasting,

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75. Justices Douglas, Stewart, Powell and Rehnquist dissented.

76. Price & Botein, *Cable Television: Citizen Participation After the Franchise 2* (The Rand Corp. R-1139-NSF, 1973).

77. See note 33 *supra*.

78. D. LEDUC, *supra* note 58, at 194.

79. 47 C.F.R. § 76.11 (1973).

80. 47 C.F.R. § 76.7 (1973). Under this extraordinary provision, entitled "Special Relief," a cable system, franchising authority, television broadcaster or any "other interested person" may petition the FCC to waive any provision of the rules, *impose additional or different requirements*, or issue a ruling. The petition can be by informal letter, supported by appropriate affidavits, but the FCC can specify other procedures, such as oral argument, an evidentiary hearing, or further written submissions "as it deems appropriate."

81. 47 C.F.R. §§ 76.51-.65 (1973).

82. 47 C.F.R. §§ 76.91-.159 (1973).

83. 47 C.F.R. § 76.251 (1973). The eventual expansion of cable systems is provided for under the following criterion:

or program origination by the cable operator;<sup>84</sup> technical operational procedures and requirements;<sup>85</sup> and minimum franchising requirements to which the local authority must adhere.<sup>86</sup> Local authorities select the franchisee, prescribe subscriber rates, monitor the cable system's performance and compliance with the regulations and permissible modes of operation which they have established.<sup>87</sup> A third tier of regulation is developing at the state level. Only a few states have enacted cable regulations so far,<sup>88</sup> but it seems likely that eventually most states will exert some degree of authority. The extent of this authority is as yet unknown, however, since the FCC has preempted the non-local areas of regulation.<sup>89</sup>

As far as actual channel usage is concerned, the rules establish certain minimum requirements and compel the system operator to install equipment which has the capacity to accommodate new services. Specifically, four channels must be allocated to "access"—one each for the public, the government, education and at least one for other leasing purposes. The cable system operator must carry all local broadcast stations and locally originate his own programming on at least one channel.<sup>90</sup> The operator is permitted to import a few distant broadcast signals, usually one or two.<sup>91</sup>

A minimum twenty-channel capacity must be provided, with at least one channel available for non-broadcast use for each channel used to carry broad-

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Whenever all of the channels described in subparagraphs (4) through (7) of this paragraph are in use during 80 percent of the weekdays (Monday-Friday) for 80 percent of the time during any consecutive 3 hour period for 6 consecutive weeks, such system shall have 6 months in which to make a new channel available for any or all of the above-described purposes. . . .

*Id.*

84. 47 C.F.R. §§ 76.201-251 (1973).

85. 47 C.F.R. §§ 76.301-311 (1973).

86. 47 C.F.R. § 76.31 (1973).

87. *Id.* This provision actually places the burden on the cable operator to make sure that his local franchising authority satisfies the general requirements of the federal statute, for if it does not he will be unable to obtain his certificate of compliance from the FCC.

88. See note 26 *supra*.

89. The present Chairman of the FCC, Richard E. Wiley, has commented:

[O]ne of the most difficult issues in question involves the consideration of the constitutional, regulatory, and procedural problems in the jointly asserted jurisdictional areas on the federal, state, and local levels, particularly where, as in New York, the state government is intending to set "standards" as to the very factors already determined in the Commission's report.

Wiley, *Procedural Accommodation of Federal and State Regulatory Interests In Cable Television*, 25 AD. L. REV. 213, 222 (1973).

90. 47 C.F.R. § 76.201 (1973). The program origination requirement is one area where the FCC's proposals have not been favored by the broadcast industry. See, e.g., 1969 *Hearings* 289.

91. 47 C.F.R. §§ 76.57-77.65 (1973).



cast signals.<sup>92</sup> For example, if the system carries ten broadcast signals, a total of twenty channels must be made available. Although no time limit is imposed, each system must have the built-in capacity to furnish two-way communication between the subscriber and the cable control center.<sup>93</sup>

Of course this brief description of the FCC's rules gives only a glimpse of their complexity. Indeed, they have been described as being as "intricate as a Chinese puzzle"<sup>94</sup> and sufficiently complex to "create confusion even among practitioners of the esoteric art of communications law."<sup>95</sup> Indeed, *Broadcasting*, the trade organ of the National Association of Broadcasters, described the regulations as "the FCC's magnum opus on CATV, . . . some 500 pages of report and order, rules and appendices, separate opinions of the commissioners, plus collateral items."<sup>96</sup>

Fortunately, it is not presently necessary to wade through the entire set of regulations in order to comprehend the erroneous regulatory approach which they promote. Rather, this task can be accomplished by focusing on a particular aspect of the FCC rules and contrasting it with OTP's proposals on the same aspect of cable television.

The problem of public access to the electronic media presents the best comparison. Like cable, the public access movement is a response to the inherent limitations of broadcasting, and in addition to its obvious first amendment implications, it represents one area where the goal of both the FCC and the OTP are ostensibly identical—the fostering of the public's right to speak out effectively. Therefore, after a brief historical review of the developing public access doctrine, the two approaches will be compared.

## II. ACCESS: THE PEOPLE'S RESPONSE TO BROADCASTING

In 1937, while postulating that the federal government should virtually take over broadcasting to make it more "democratic," S. E. Frost, Jr. recommended that "[i]nsofar as the limits of radio permit, every individual so desiring should be permitted to present his point of view uncensored by any authority."<sup>97</sup> This paradox—everyone has a right to speak, but if everyone does, no one will hear—has plagued broadcasting since its inception. In response, the FCC first demanded that broadcasters provide air time to mem-

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92. 47 C.F.R. § 76.251(a)(1) (1973).

93. 47 C.F.R. § 76.251(a)(3) (1973).

94. D. LEDUC, *supra* note 58, at 193-94.

95. Hochberg, *Which Way is Cable TV Going?*, 59 A.B.A.J. 77 (1973).

96. *The FCC Delivers On Cable*, BROADCASTING, Feb. 7, 1972, at 17.

97. S. FROST, JR., *IS AMERICAN RADIO DEMOCRATIC?* 204-05 (1937).

bers of the public who wished to discuss controversial issues,<sup>98</sup> but this policy soon gave way to an administrative nightmare known as the "fairness doctrine."<sup>99</sup> Under the two-fold fairness requirement, the broadcaster must devote a reasonable percentage of time to public issue broadcasting and insure that the public has a reasonable opportunity to hear conflicting positions on the issues during this programming.<sup>100</sup> When a commercial message advocates one side of an important and generally recognized public issue, the doctrine is activated, and the broadcaster must provide time to opposing points of view. The courts first applied the fairness doctrine to cigarette commercials in *Banzhaf v. FCC*<sup>101</sup> and continued the reasoning in *Friends of the Earth v. FCC*.<sup>102</sup> Although these cases are clearly victories for those attempting to publicize their views, the fairness doctrine actually does little to promote access. The criteria are extremely vague, and the access provided is conditioned on the broadcaster first allowing an issue to be raised.

Recognizing these weaknesses in the fairness doctrine as a vehicle for the expression of minority views, other groups sought to strike at the heart of the broadcaster's power—his license to broadcast. This license must be renewed every three years,<sup>103</sup> and the FCC uses this renewal process to hear challenges to the particular licensee's policies. The practice was initiated by Everett Parker, head of the United Church of Christ's Office of Communications, when he assisted members of a local community in challenging the license renewal of WLBT-TV in Jackson, Mississippi. The FCC first denied standing to the viewers, but was resoundingly rebuked by then Circuit Judge Warren Burger in *Office of Communications of the United Church of Christ v. FCC*.<sup>104</sup> Subsequently, the FCC renewed the license and Judge Burger ultimately revoked the license.<sup>105</sup> Finally receiving the message, the FCC voted three to one to deny renewal to WLBT-TV, and promptly promulgated its *Policy Statement Concerning Comparative Hearings Involving*

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98. *United Broadcasting Co.*, 10 F.C.C. 515, 518 (1945).

99. *Editorializing By Broadcast Licensees*, 13 F.C.C. 1246 (1949).

100. For a more comprehensive analysis of the fairness doctrine, see Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768 (1972). This doctrine has been increasingly questioned, and one court has recently declared that the doctrine does not permit the FCC to judge unilaterally the content of a broadcasting program. *NBC v. FCC*, No. 73-2256 (D.C. Cir. Sept. 27, 1974).

101. 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

102. 449 F.2d 1164 (D.C. Cir. 1971).

103. 47 U.S.C. § 307(d) (1970).

104. 359 F.2d 994 (D.C. Cir. 1966).

105. *Office of Communications of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969).

*Regular Renewal Applicants*<sup>106</sup> which proposed that license renewal challengers show, as a condition precedent to challenge, that the incumbent station had not rendered "substantial service" to the community. Again, however, the D.C. Circuit disallowed the FCC's determination, with Judge Wright stating that such a requirement violated the "public interest" standard of the Communications Act.<sup>107</sup> The broadcasters are still seeking to blunt the effectiveness of these challenges, however, and an amendment to the Communications Act has recently been proposed that would lengthen the licensing period to five years.<sup>108</sup> As the response of broadcasters and the FCC indicates, these license renewal challenges are at least economically irksome and, according to one report,<sup>109</sup> force the stations to be more responsive to minority views; unfortunately, they are ad hoc procedures and probably have little effect on the general policies of the broadcast industry.

Thus, neither the fairness doctrine nor license renewal challenges presents an effective mode of gaining access to the electronic media. In addition, although a limited right of access was provided by the Communications Act,<sup>110</sup> the courts historically had refused to grant any individual a constitutional right to demand air time.<sup>111</sup> In other contexts, however, the Supreme Court seemed to be laying the groundwork for just such a constitutional prerogative. In *Hague v. CIO*,<sup>112</sup> the Court struck down ordinances which restrict speech in public parks. In the Court's view, these laws abridged the union's right to communicate effectively with a relevant audience in an appropriate forum. This right to appropriate forums was extended to privately owned streets and sidewalks,<sup>113</sup> shopping malls,<sup>114</sup> public schools,<sup>115</sup> and bus terminals.<sup>116</sup> To many, the first amendment has come to include not just the traditional right to be free of governmental interference with personal expression, but a positive right both to *speak* effectively and to

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106. 22 F.C.C.2d 424 (1970).

107. *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971).

108. H.R. 12993, 93rd Cong., 2d Sess. § 2(b) (1974).

109. Kuttner, *TV Lobby Pushing Bill to Blunt License Challenges*, *The Washington Post*, July 22, 1974, § D, at 10, col. 1.

110. 47 U.S.C. § 315(a) (1970), *as amended*, (Supp. II, 1972).

111. *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950); *accord*, *McIntire v. Wm. Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945); *Post v. Payton*, 323 F. Supp. 799 (E.D.N.Y. 1971).

112. 307 U.S. 496 (1939).

113. *Marsh v. Alabama*, 326 U.S. 501 (1946).

114. *Local 590, Amalgamated Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

115. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969).

116. *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).

hear the voices of public debate. Further, when the Supreme Court upheld the fairness doctrine in *Red Lion Broadcasting Co. v. FCC*<sup>117</sup> and announced that the public's right to view and listen was paramount to the broadcaster's rights, the promoters of constitutional access claimed victory.<sup>118</sup>

This novel constitutional theory was extracted from earlier writings and was restated, most notably by Professor Jerome Barron in 1967.<sup>119</sup> Barron postulated that the first amendment rights of the established media were being protected by the courts at the expense of the public's right to individual expression. He placed the blame upon the Supreme Court for espousing an anachronistic, "romantic" view of the first amendment. This traditional view, derived from the writings of utilitarian philosopher John Stuart Mill, holds that truth will only be discovered within a free marketplace of ideas, without governmental interference. Barron suggests, to the contrary, that the government *must* interfere to force the broadcasters to grant paid access to the public for the discussion of controversial issues. Without access, he concluded, effective free speech is denied.

The threshold problem for the proponents of access was, of course, "state action." Were the broadcasters sufficiently intertwined with the government for their actions to be considered actions by the state, hence proscribed by the Constitution? This problem seemed partially resolved by *Public Utilities Commission v. Pollak*,<sup>120</sup> where the Supreme Court invoked the first amendment in support of a federal agency's approval of the playing of radio music within a privately-owned public transit bus. Moreover, several lower federal and state courts had found the presence of state action and utilized the Supreme Court's "forum" decisions as a basis for granting access to protesters seeking to publicize their views.<sup>121</sup>

The stage was set for a final declaration by the Supreme Court when Judge Wright of the United States Court of Appeals for the District of Columbia Circuit, in a lengthy and provocative opinion, declared that the right of access is mandated by the Constitution. In *Business Executives for Vietnam Peace v. FCC*,<sup>122</sup> Judge Wright refused to allow a radio station the editorial

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117. 395 U.S. 367 (1969).

118. Statement of Professor Jerome Barron, *Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92nd Cong., 1st & 2nd Sess., at 106 (1972).

119. Barron, *Access To The Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

120. 343 U.S. 451 (1952).

121. See, e.g., *Kissinger v. New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967); *Wirta v. Alameda-Contra Costa Transit Dist.*, 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967).

122. 450 F.2d 642 (D.C. Cir. 1971), *rev'd sub nom.* *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

discretion to reject summarily controversial commercials. Reversing the FCC, the court found sufficient state action involved in the broadcaster's conduct and held that an absolute ban on public issue announcements violated the public's right to be informed, at least when other types of advertisements were accepted. The opinion was the high-water mark for access to the broadcast media. Nearly two years later, however, the Supreme Court reversed,<sup>123</sup> concluding in a 7 to 2 decision that neither the first amendment nor the Communications Act mandated that broadcasters accept paid editorial advertisements. The majority, however, did not represent a unity of thought. Six separate opinions were written, each evidencing the difficulty of applying an amendment written for street orators to protect a medium which by its very nature limited the public's right of self-expression.<sup>124</sup>

#### A. *Public Access and Cable Television*

Public access, to an extremely limited degree, began as part of the "local origination" on the Canadian cable systems in Montreal approximately fifteen years ago.<sup>125</sup> Canadian cable operations expanded quickly and profitably, largely because they carried the signals of United States broadcasting stations which were highly attractive to the Canadian audience. Local origination was therefore simply grafted onto an already large and viable system as a promotional device to build community relations and attract subscribers. Sports and innocuous educational or instructional programs were emphasized, and unfortunately, politics and highly controversial issues were avoided. Nevertheless, during a typical week 100 to 500 local people appeared on the screen, and the demand for time far exceeded the time made available by the operator. Although no surveys were made, the cable operators estimated that twenty percent of the audience (Montreal alone had 100,000 subscribers in 1970) had watched the channel at some time.

The first community-operated cable channel in the United States was made available to the Junior Chamber of Commerce of Dale City, Virginia, from December 1968 to early 1970.<sup>126</sup> The broadcast television reception

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123. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

124. Chief Justice Burger announced the Court's judgment and was joined in part by Justices White, Powell, Blackmun and Rehnquist. Separate opinions, concurring in part, were written by Justices Stewart, White and Blackmun. Justice Douglas concurred in the judgment only, filing a separate opinion reflecting his particularly divergent views. Justice Brennan authored the dissent, joined by Justice Marshall. For an analysis of the several opinions, see 23 CATH. U.L. REV. 339 (1973).

125. The following textual description of the Canadian and Dale City cable systems was derived from Feldman, *Cable Televisions: Opportunities and Problems in Local Program Origination* (The Rand Corp. R-570-FF, 1970).

126. *Id.* at 10.

in Dale City was poor, thus ninety-eight percent of the community's 13,000 population subscribed to the cable service. No advertising was carried, and censorship was provided by an advisory board of the Dale City Civic Association, consisting of one representative from such groups as the Jaycees, the Boy Scouts, the Girl Scouts, Little League Baseball, the bridge club, PTA's, all three churches and the volunteer fire department. The system used non-professional, all-volunteer personnel to produce a one hour program each week, concentrating on community activities and news. After only a few months, the community abandoned local origination, primarily because of financial difficulties. Before its demise, however, the advisory board prepared a "Code of Ethics for Community Television" which included this prescription for bland programming:

The System shall insure that its programming is on a level of dignity commensurate with the cultural, social and moral standards of the Community and shall insure that programming is impartial and nondiscriminatory and not directed at any specific racial, ethnic, social, cultural or religious group with a latent or implied derogatory intent.<sup>127</sup>

Since July 1, 1971, two channels on each of New York City's cable television systems have been offered to the public on a first come, first served basis, at little or no cost. On the basis of more than two years of work and experimentation, a recent report has concluded that public access has found a "lasting if unorganized constituency" and is moving toward the "unpredictable mix of programming" that its advocates sought.<sup>128</sup> The channels were little used at first, but by October 1971 several video production groups had begun submitting programming and channel usage grew steadily. In June 1973, 330 original hours were cablecast by one of the two cable companies franchised by New York City, and to date more than 2,000 original hours have been cablecast. Much of the programming has been dull and of poor technical quality, but the interest in some programs has been great, stimulating public access experiments throughout the country.<sup>129</sup>

Regulation of the public access channels was first handled by the New York City Office of Telecommunications of the Bureau of Franchises until the FCC required that the local cable operator be the regulating body beginning in March 1972.<sup>130</sup> The two cable companies then established their own regulations, providing that the company would have the right to pre-

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127. *Id.* at 31.

128. D. ORTHMER, *THE WIRED ISLAND: THE FIRST TWO YEARS OF PUBLIC ACCESS TO CABLE TELEVISION IN MANHATTAN 1* (1973).

129. *Id.* at 1-2.

130. Cable Television Report and Order, 36 F.C.C.2d 143 (1972).

view all programs to determine liability and the channel time to be allocated. Time was allocated on a first come, first served basis, with some restrictions on the total time, or total prime time allowed each applicant in any given week.<sup>131</sup> There was no charge for non-commercial presentations, but costs varied for commercial presentations.

### III. A COMPARISON IN ACCESS: THE FCC RULES V. OTP'S PROPOSAL

The FCC has long held the view that a cable system should operate as an "additional outlet for community self-expression."<sup>132</sup> Accordingly, the current FCC rules contain a detailed set of provisions dealing with "non-broadcast" channel usage, of which "access" is a part.<sup>133</sup> Under this provision a cable system must operate as a "local outlet" to a "significant extent," and "have available" facilities for local production.<sup>134</sup> Access is sub-categorized into four distinct channels which must be offered by the cable operator. Three must be offered at no cost—one for the public, one for educational authorities, one for the government—and the fourth must be available for leasing. In addition, the operator must satisfy the "need plus one" rule—whenever all non-broadcast channels "are in use during 80% of the week-days (Monday-Friday) for 80% of the time during any consecutive three-hour period for six consecutive weeks," another channel must be provided.<sup>135</sup>

In the short span since their promulgation, the access and local origination rules have been consistently criticized.<sup>136</sup> They are filled with "ambiguities and pitfalls,"<sup>137</sup> and, worst of all, they impose contradictory duties upon the cable operator. On the one hand, section 76.251(a)(9) provides that the operator "shall exercise no control over program content," but section 76.251(a)(11) requires him to exclude some types of programming—lotteries and obscenity. The FCC does not suggest a way in which the operator can censor without exercising any control over content.

In addition, the actual implementation of the access requirements has caused more than just legal problems for the cable operator. The FCC has given quite a few systems until March 1977 to conform to the rules primarily because of the "financial hardship" involved in providing the additional channels and production facilities for access.<sup>138</sup>

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131. D. ORTHMER, *supra* note 128, at 2.

132. 33 Fed. Reg. 3188, 3189 n.2 (1968).

133. 47 C.F.R. §§ 76.201-.251 (1973).

134. 47 C.F.R. § 76.201(a) (1973).

135. 47 C.F.R. § 76.251(a)(8) (1973).

136. See, e.g., Botein, *Access to Cable Television*, 57 CORNELL L. REV. 419 (1972).

137. Price & Botein, *Cable Television: Citizen Participation After The Franchise 4* (The Rand Corp. R-1139-NSF, 1973).

138. See, e.g., TelePrompter Cable Comm. Corp., 31 P. & F.2d 469 (1974). Not

Responding to the criticisms concerning the vagaries of the provisions, the FCC has recently promulgated a *Clarification of Rules and Notice of Proposed Rulemaking*<sup>139</sup> which repeats the refrain that its previous rules were "experimental in nature and would be clarified, modified, or changed as the situation warranted," and that now "[t]he time has come, after two years of operational experience, to make some modifications and clarifications of our rules to keep pace with the changing picture presented by cable's development and to resolve whatever ambiguities exist."<sup>140</sup> Using that exemplary goal as a standard, the access program has been "carefully weighed" by the FCC and found to be both reasonable and within the public interest. Certain points have been clarified, however. First, conglomerate cable systems which serve a large number of small suburban communities may petition for a waiver which would allow the joint use of access channels and facilities.<sup>141</sup> Second, any franchises which seek to require the cable operator to furnish more than the federally prescribed number of access channels must be "reasonable and necessary for a planned local program of use."<sup>142</sup> Third, on the free access channels, an individual can "reserve" a particular time on a regular basis, but all "desirable time slots" must not be "frozen."<sup>143</sup> Fourth, commercial educational enterprises (computer schools, beauty schools, etc.) would not be "proper" users of the "education access channel."<sup>144</sup> Fifth, the FCC's access rule would work better if county governments would indicate what they consider to be "discrete communities," because "such delineations are, after all, uniquely a part of the responsibility of local officials."<sup>145</sup> Sixth, the FCC does not think that it is a "particularly good idea" that local franchising authorities specify the kinds of equipment (cameras, microphones, etc.) that must be made available for use on the access channels, but the FCC will not disallow these "service packages" unless they are "clearly excessive."<sup>146</sup> Such packages would not be acceptable, however, if equipment were given specifically to any one group, to the practical exclusion of others. Finally, the FCC plans to issue a document "shortly" which will address the problem of whether to

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all of the waiver requests have been granted. *Champlain Cable*, 30 P. & F.2d 25 (1974).

139. 39 Fed. Reg. 14288 (1974).

140. *Id.*

141. *Id.* at 14289.

142. *Id.* at 14291.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 14299.



allow local authorities to use a two percent franchise fee to help fund access to the system.<sup>147</sup>

As the "clarifications" enumerated above indicate, the FCC has simply added another layer of language between cable television and the implementation of a localized access program. The endless cycle of definition and redefinition has begun. One can envision private and government attorneys soon arguing over the distinction between a "reserved" time slot and a "frozen" one.

In 1972, one well-respected commentator indicated that the FCC's access rules do not go far enough in providing formulas for determining how the access channels will be used in a particular community.<sup>148</sup> He proposes discarding both local administrative and simple marketplace regulation of access, and implementing a plan which would apportion access between commercial and non-commercial uses on the basis of time period rather than channels; give each time allocation an "attractiveness index" according to its audience share; and bar the operator from controlling the program content.<sup>149</sup>

As should be readily apparent, this suggestion for public access to cable suffers from the same defect as the access rules it seeks to improve. Confusing one medium with another, the agency and its proponents react to the obvious regulatory problems of implementing access by recommending more regulations, each more detailed than its predecessor. Clearly, such applications of incredibly complex governmental rules will not promote access, but retard it. Fortunately, OTP's proposed amendment to the Communications Act offers a more sensible and generally pragmatic approach to cable television in general and access in particular.

#### A. *The Whitehead Report and the OTP Proposals*

On June 27, 1971, President Nixon announced the formation of the Cabinet Committee on Cable Communications<sup>150</sup> to formulate proposals for a comprehensive national policy on cable communications. The Committee's

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147. *Id.* at 14300.

148. Botein, *supra* note 136, at 438-55.

149. *Id.*

150. The committee was composed of Peter G. Peterson, Secretary of Commerce; Elliot L. Richardson, Secretary of Health, Education and Welfare; George Romney, Secretary of Housing and Urban Development; and Presidential advisers Herbert G. Klein, Leonard Garment and Robert H. Finch. Clay T. Whitehead, Director of the Office of Telecommunications Policy, served as Chairman of the Committee, and his office conducted the Committee's staffwork; hence, the recommendations became known as the Whitehead Report.

report,<sup>151</sup> issued in January 1974, represents the most innovative governmental response to cable communications that has occurred during cable's twenty-five year history.

The Committee has examined the growth of cable communications and the governmental response to it, and we have concluded that a new policy is needed . . . . At the heart of the Committee's recommendations is a proposed policy that would *separate control of the cable medium from control of the messages on it*. The goal of this policy is to assure the development of cable as a communications medium open to all, free of both excessive concentrations of private power and undue government control . . . . Our specific recommendations . . . flow from this basic policy proposal; their thrust is that neither the local monopoly power of each cable system nor the government regulatory power necessary to prevent abuse of that private power should be extended to the programs or other content of cable's channels.<sup>152</sup>

With this "separations policy" as its key rationale,<sup>153</sup> the Committee offered both transitional and long-range recommendations to free cable from the stranglehold of the current rules and to permit its independent growth as a different and distinct medium. Specifically,<sup>154</sup> the Committee suggested that cable operators should be required to offer their channels for lease to others for any lawful purpose, without discrimination among "comparable" users (e.g., commercial v. non-commercial); to comply with total channel capacity requirements of the FCC and the franchising authority and with the minimum technical standards established for cable distribution by the FCC; to offer subscribers a selective means to prevent reception of personally undesirable programming and the interception of confidential information distributed over the cable. An operator would be allowed to own and operate any other media in the market area, but would be prohibited from having any financial or ownership interest in, or control over, the production, selection, financing or marketing of the programs cablecast over his leased channels; nor could the operator jointly own or control any interest in groups of cable systems, interconnection facilities or program supply services.

Channel users would be required to adhere to the copyright laws and accept full criminal and civil liability for programs they originate.<sup>155</sup> The

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151. See note 19 *supra*.

152. *Id.* at 4 (emphasis added).

153. The "separations" idea is not new. See Filings by the Electronic Industries Association, Doc. no. 18397, CATV, 15 F.C.C.2d 417 (1968).

154. The following specific recommendations are summarized in CABLE REPORT, *supra* note 19, ch. VI.

155. Presently the cable operator may also be held liable; he must therefore exercise censorship over programs, or face possible prosecution. See p. 111 *supra*.

users would be allowed to lease channels and obtain distribution services from any cable systems, offer the public any lawful program, establish their own prices for any programs they produce or supply and take legal action against any cable operator who discriminates against them because of the program content or the user's race, religion, nationality or beliefs, or who charges discriminatory rates for the cable's use.<sup>156</sup>

The FCC would be prohibited from regulating the content of the cable programs in any way, including any affirmative obligation requiring "balance" of news; designating channels for special uses; regulating rates or requiring free service; limiting, by regulation or policy, the ownership of cable systems by broadcast stations or networks, newspapers, magazines or any other media; or limiting the number of systems owned by any one firm, or the number of subscribers to be served by any one firm.<sup>157</sup> The FCC would be allowed to establish minimum technical standards, require adequate channel capacity, and apply restrictions on the presentation, for a fee, of professional sports programs.<sup>158</sup> Otherwise, the local franchising authorities would have the bulk of the responsibility in setting up cable systems in their own communities.<sup>159</sup>

#### *B. Implementation of the Recommendations:*

##### *A Proposed Amendment*

In April 1974, Clay T. Whitehead, Director of the Office of Telecommunications Policy, sent a draft bill to Congress which is designed to implement the new national cable communications policy outlined in the Whitehead Report.<sup>160</sup>

The proposed bill would not only completely amend the present rules, but, more importantly, the amendment explicitly recognizes "that the application of current policies respecting the communications media to cable com-

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156. CABLE REPORT, *supra* note 19, ch. VI.

157. *Id.*

158. The acquisition of professional sports program rights has been a major area of dispute between the cable and broadcasting industries for some time. In 1969, Representative James Harvey (R-Mich.) asked the Chairman of the FCC what the Commission was doing to "protect the American viewing public" from having to pay to watch football games. See 1969 *Hearings* 34-35; see also *id.* at 53, 68-69. Recently cable enthusiasts won a victory when the Senate Judiciary Committee killed a provision in a proposed copyright bill that would have blacked out major sports events from most cable systems in the country. Carmody, *A Cable TV Victory: Still in the Big League*, *The Washington Post*, June 12, 1974, § C at 4, col. 1.

159. CABLE REPORT, *supra* note 19, ch. I at 28.

160. Letter from Clay T. Whitehead to the Honorable Carl Albert, Speaker of the House of Representatives, April 1974.

munications is inappropriate in that the technology of cable systems eliminates the channel scarcity."<sup>161</sup> Although its provisions are manifold, the pertinent public access system can be described simply. Section 708(e) mandates that the local franchising authority, not the FCC, shall simply

require the reservation of one channel which shall be available upon request to any person, free of charge, for any purpose, pursuant to such terms and conditions, consistent with Section 710(a) of this title, as the licensing authority shall, by regulation, adopt

. . . .

In line with the inherent "localism" of cable systems, this explicit statutory provision guarantees that at least one "electronic soapbox" will be available to the public, regulated locally, and, significantly, any local restrictions on free speech will be subjected to the careful scrutiny of the federal district courts (Section 710(a)). The combination of this provision with the general "separations policy" of the proposed amendment, under which the cable operator will have no control over, nor liability for, the programs he distributes, perhaps means that partial public access to cable television can finally occur, in contrast to the dearth of public access which, as a result of the Supreme Court's *CBS* decision, currently characterizes the broadcast industry.<sup>162</sup>

Both the Canadian and New York experiences involving access to cable indicate that this new medium can fulfill the prophecies made on its behalf nearly a decade ago. The technology is undoubtedly there, and hopefully those experiments will spawn others. But more than anything else the time has come for Congress to provide the FCC and the cable industry with the national guidelines they have sought for so long, and to finally allow cable to realize its potential as the twentieth-century soapbox. Adoption of OTP's proposals will provide no panacea, but it would at least signal an end to the regulatory myopia which has for so long confused one medium with another.

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161. *Id.*

162. See the discussion of the *CBS* decision, p. 110 *supra*.